IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
LETTERS PATENT APPEAL NO.55 OF 2002
IN
WRIT PETITION NO.2448 OF 1995

Mahindra & Mahindra Limited. ... Appellant
(Orig. Petitioner)

Versus

1. Sunil Yeshwant Pandit

2. Shri P.S. Narkar,
Presiding Officer,
Labour Court, Nashik. ... Respondents
(Orig. Respondents)

CORAM : H.L. GOKHALE &
SMT.R.S.DALVI, JJ.

DATE OF RESERVATION OF JUDGMENT: 18th October 2005

DATE OF PRONOUNCEMENT OF JUDGMENT : 30.11.2005

Ms.Melanie D'Souza with Mr.C.U.Singh i/by M/s.Haresh Mehta & Co. for appellant.

Ms.S.S.Chiparikar with Mr.D.Y. Chitnis for respondent No.1.

Respondent No.2 being the Labour Court is formal party.

JUDGMENT : (Per H.L. Gokhale, J.)

1. This Letters Patent Appeal seeks to challenge the judgment and order dated 10th/11th January 2002 rendered by a learned Single Judge of this Court in Writ Petition No.2448 of 1995 filed by the appellant herein. The learned Single Judge dismissed the said Writ Petition by her order and

upheld the Award dated 11th May 1994 given by the Labour Court at Nashik in Reference (IDA) No.5 of 1987, which had set aside the dismissal of respondent No.1 from his service and granted him reinstatement with continuity in service and full back wages from the date of dismissal i.e. 31.1.1986 till reinstatement.

2. The relevant facts leading to this Letters Patent Appeal are as follows:-

. The appellant is a Company engaged in the business of manufacturing jeep-type vehicles and tractors amongst other products. The appellant has one of its factories situated in the Industrial Estate at Satpur, Nashik. As per para-3 of the Writ Petition, the appellant employs about 1000 employees at the said factory. The 1st respondent was employed in that factory as a Fitter with effect from 1st September 1983. On 26th July 1985, at about 3.30 p.m. when he was leaving the factory driving his scooter after his working hours were over, the Security Supervisor at the factory gate found five straight shank drill bits of different types hidden underneath the mat of the scooter (on which the scooter riders place their feet). No explanation was

offered by respondent No.1 when he was asked about this discovery.

3. Respondent No.1 was issued a charge-sheet on 28th July 1985 and was suspended pending the enquiry. The charges levelled against him were as follows:-

. (i) Theft or dishonesty in connection
. with the employer's business or property.

. (ii) Acts subversive of discipline and good behaviour on the premises premises of the establishment.

These charges are referable to Clauses 24(d) and (l) of the Model Standing Orders (as applicable to the Industrial Workmen) framed under the Industrial Employment (Standing Orders) Act, 1946.

4. Thereafter a departmental enquiry was conducted. Respondent No.1 was represented by one Mr.E.G. Woodman, a fellow workmen. The appellant-Management examined two witnesses in support of the charges. They were (i) Shri L.R. Deshmukh, Security Supervisor at the relevant time

at the factory gate and (ii) Shri T.H. Patil, the then Administrative Officer. Respondent No.1-workman examined himself and one Shri Abdul Karim, Supervisor in the body building shop. The Enquiry Officer submitted the report on 21st November 1985 and held that the charges had been proved. The appellant accepted those findings and issued an order dismissing him from service on 31st January 1986.

5. The 1st respondent raised a dispute under the Industrial Disputes Act, 1947 and it came to be referred to the Labour Court at Nashik by the order dated 23rd March 1987. The 1st respondent filed his Statement of Claim on 8th June 1987. Amongst others in para-2 of his Statement of Claim he contended that the vested interests working in the Company had fabricated a sinister plan to throw him out of the Company. The appellant filed its Written Statement on 16th August 1988. In para-5 of the Written Statement, it denied the knowledge of any such vested interests working in the Company who did not like the prosperity of the 1st respondent. It was thereafter stated that further statement about the fabrication of the sinister plan seemed to be figment of his own imagination and was denied by the Company. At the

end of para-3 of the Written Statement, it was brought to the notice of the Court that the original enquiry papers were misplaced, though the copies thereof would be produced. It is material to note that the 1st respondent has not raised any dispute about the correctness of the copies of enquiry papers, though he did contend that the enquiry was not conducted fairly and properly. The Management further prayed that the legality and validity of the enquiry be decided by framing an issue in that behalf and in case the Hon'ble Court were to decide against the Company, the Company may be permitted to lead evidence to substantiate the allegations against the workman.

6. The learned Judge of the Labour Court framed two issues to begin with viz. (i) Whether the domestic enquiry held against the workman is fair, proper and legal ? and (ii) Does the employer prove the misconduct alleged against the workman, if the domestic enquiry is vitiated for any reason? As far as the first issue is concerned, the workman filed an Application stating that he did not wish to lead any oral evidence as regards the legality and validity of the enquiry. The Company examined the Enquiring Officer Shri S.N. Shah. He deposed that he had

held the enquiry and he produced true copies of the original documents. Both the parties were represented by their Advocates and the Counsel for respondent No.1 had no objection for exhibiting the enquiry papers and hence, they were exhibited and were given Exhibit marks accordingly. The learned Labour Court Judge, after hearing the Advocates, held that the enquiry was fair and proper and on the second issue, he held that it did not survive. Accordingly, he passed the order on the preliminary issues on 2.4.1993 and directed the matter to proceed further.

7. Thereafter at the second stage of the proceedings, the learned Judge framed the following three issues:-

. " (i) Whether the punishment of dismissal
. awarded to the workman / second party is
. shockingly disproportionate ?

. (ii) Is the workman / second party
. entitled to reinstatement with continuity
. of service and full back wages ?

. What order and relief ? "

The workman examined himself. He was living in a joint family and was not employed in spite of making best efforts. The Management examined one Shri Deepak Palnitkar, an Officer from the Personnel department to produce the order of termination and to prove its service. Thereafter the arguments were heard and the learned Labour Court Judge answered both those issues in the affirmative and passed the Award accordingly on 11th August 1994 directing the reinstatement of the 1st respondent with back wages and continuity in service.

8. This Award was challenged by the appellant by filing a Writ Petition bearing No.2448 of 1995 invoking Article 226 of the Constitution of India. The Petition was admitted by a learned Single Judge on 11th September 1995, and he granted the interim stay on implementation and enforcement of the impugned Award. The Petition thereafter reached for final hearing before another learned Single Judge. Amongst other submissions, it was contended before the learned Single Judge that in Part-I of the Award, evidence was confined to the issue of legality and validity of the enquiry and a finding was given that the enquiry was conducted in compliance with the principles of natural

justice. The second issue was as to whether the employer proved the misconduct if the enquiry was vitiated. Inasmuch as the learned Labour Court Judge answered the first issue in the affirmative, he answered the second issue by stating that the issue did not survive. Thus, the employer was not given any opportunity to prove the misconduct at that stage. At the second stage of the proceedings, the issues framed were only with respect to the adequacy of the punishment and the relief. The evidence was confined to those aspects. It was at that stage that in para-12 of the Award, the learned Labour Court Judge held that there was no material in the enquiry to prove that the concerned articles belonged to the Company and, therefore, came to the conclusion that the misconduct was not proved and then final relief was granted. It was, therefore, submitted on behalf of the appellant that although the learned Labour Court Judge was holding that the misconduct was not proved, the appellant-employer was not given any opportunity to prove the same. It was submitted that the employer had that right, as held in different judgments from time to time and the same had been denied.

9. The learned Single Judge, who heard the

Writ Petition, however, took the view that the approach of the learned Labour Court was a permissible one. She referred to the observations from paragraph 33 of the judgment of the Apex Court in **Workmen of Firestone Tyre & Rubber Co. vs. Management reported in AIR 1973 S.C. 1227** to the effect that the Labour Court is now empowered under Section 11-A to reappraise the evidence and examine the correctness of the findings. It has come to its own conclusion about guilt or otherwise. She held that only in case the Court took the view that the findings were perverse that it will be necessary for the Labour Court to give an opportunity to the employer to prove the misconduct. In para-15, the learned Judge observed as follows:-

> " In the event that the Labour Court decides that the findings are not perverse but are such that it would come to a different conclusion, it is open for the Labour Court in exercise of Section 11-A to reappraise the evidence and come to a different conclusion. In such an event, it is not necessary for the Labour Court to give an opportunity to the employer to lead evidence. While exercising powers

> under section 11-A, as held by the Supreme Court, the Labour Court virtually sits in appeal against the findings recorded by the enquiry officer. The Industrial adjudicator has the power to decide as to the adequacy of the evidence and the conclusion on facts drawn by the enquiry officer. It is not necessary to give the employer an opportunity to lead evidence in every case where the Labour Court differs with the findings of the enquiry officer, unless the findings are perverse. "

The learned Judge, therefore, dismissed the Writ Petition by the impugned judgment and order dated 10th/11th January 2002.

10. It is this judgment and order which is assailed in the present Letters Patent Appeal. It was submitted on behalf of the appellant-Company that the view taken by the learned Single Judge was not correct. In a case where the enquiry is held to be fair and proper, the occasion to interfere arises only when the findings are perverse or where the action is malafide. The very fact that in a case of fair and proper

enquiry the Court has interfered, implies that according to the Court the findings are perverse, though it has not stated so in as many words. It was pointed out on behalf of the appellant, as held in **Bharat Forge Company vs. A.B. Zodge reported in (1996) 4 SCC 374,** that in a case wherein the enquiry is held to be fair and proper but the findings are perverse, an opportunity had to be given to the employer. A similar view was taken earlier by a Division Bench of this Court in **Fida Film & Hotel Co.Pvt. Ltd. vs. Theatre Employees' Union reported in 1986 I CLR 255** following the law laid down by the Apex Court in **Ritz Theatre vs. Workmen reported in AIR 1964 S.C. 295**. The learned Labour Court Judge had held in para-12 of his Award as follows:-

> " Accordingly I have gone through the enquiry proceedings where also the procedure of the said material is lacking and **there is no material in the enquiry that the said articles were belonging to the company.** The ld. Adv. for the first party has also cited several decisions as regards the ownership of the company of the material found, however, the said cases show that the material which was

found in possession of the workman was the product of those companies whereas in the present case, the drill bits are not the produce of the first party / company. "

(Emphasis supplied)

Thus the learned Labour Court Judge has, in fact, held that there is no material to hold that the misconduct had been proved, meaning thereby that the findings were perverse though he has not used the same term. The learned Labour Court Judge has observed that it is necessary to strictly prove the ownership of the said material, that the ownership of the material had not been proved and that in the absence thereof, the misconduct was not established. Thus, in a way he held that the findings were perverse. Thereafter he went into the question as to whether the punishment was disproportionate without giving the employer an opportunity to prove the misconduct. It was submitted that the learned Single Judge had erred in coming to the conclusion that since the Labour Court had not held the findings to be perverse, it was not necessary for it to give an opportunity to the employer to lead evidence.

11. This Appeal was admitted on 25th February 2002 and it reached before another Division Bench on 7th April 2005. The Division Bench heard the Counsel for both the parties at length and came to the conclusion that the findings (and the approach) of the Labour Court and the learned Single Judge to the extent it denied an opportunity to the employer to lead evidence in support of the charges, were both erroneous. The Division Bench gave its reasonings in support of that conclusion and by consent of both the Counsel, passed a detailed order setting aside those findings. It was, however, requested by the Counsel for both the parties that since the matter was pending for a very long time, it would be desirable that the Labour Court be asked to record the evidence on the alleged misconduct and give its findings and submit the same to the High Court. The Division Bench passed an order accordingly. It is material to note that the Division Bench referred to the law laid down by another Division Bench in **Vinod Wani vs. Permanent Magnets reported in 2002 II LLJ 1123** which had specifically referred and followed the law laid down in **Bharat Forge Company (supra)**. The relevant paragraphs of this order dated 7th April 2005 containing the reasonings and the

operative part containing the relevant directions Nos.3 and 4 read as follows:-

> " We have heard this matter for a pretty long time. Both the counsel have ultimately found that in view of the judgment of this Court reported in **2002 II LLJ 1123 in the matter of Vinod V. Wani vs. Permanent Magnets Limited**, the procedure which the Labour Court ought to have followed in the present matter, is as demonstrated in paragraph No.22 of the said judgment. Paragraph No.22 of the said judgment reads as under:
>
> " The first stage of the enquiry before the Labour Court ended by holding that the enquiry was fair and proper and as per the principles of natural justice. Second stage of the enquiry before the Labour Court ended by holding that the findings recorded by the enquiry Officer were perverse and the third stage starts that of giving an opportunity to the management to lead evidence in support of the charges framed against the employees and is subject to the condition that the management had reserved such a right in the written statement filed by the management. "
>
> Therefore, in the present case when the Labour Court came to the conclusion that the findings of the Enquiry Officer are vitiated at the second stage, the Labour

Court should have halted and given a third stage opportunity to the Employer. However, the Labour Court has clubbed the second stage, third stage and aspect of the disproportionality of the punishment at one and one stage thereby depriving the Employer-management to lead evidence in respect of the guilt of the workman.

5. Learned counsel for both sides have further pointed out one more aspect that of sending the whole matter back to the labour court for this purpose, will result into a great inconvenience to the workman. The present litigant-workman is litigating the case since 1985 and for last more than 20 years he is in the court and if the matter is remitted back, the workman will have to face second inning of litigation. Therefore, to overcome this trauma of second inning of litigation and equally to make available the opportunity to the employer to lead evidence in respect of the guilt of the workman, which was deprived of as a result of the erroneous exercise by the Labour court, both the counsel, by consent, have suggested us to

pass the order in following terms. Hence, the order.

O R D E R

(1) The Appellants-employer, who have reserved their rights to lead evidence in respect of the guilt/misconduct of the accused, in case findings are disturbed by the Labour Court, being had or perverse at a second stage of a proceeding, is hereby allowed to lead evidence afresh before the learned Labour Court in respect of the alleged misconduct of the respondent - workman.

(2) We hereby permit the appellant - employer to lead evidence on the point as to whether during the pendency of the litigation, the respondent - workman was gainfully employed or not.

(3) By consent of both sides, the findings of the Labour Court and the learned Single Judge to the extent of the above referred points are hereby set aside. The Labour Court shall consider the above referred two issues afresh on the basis of the

material and evidence which would be led before it.

(4) The Labour Court shall allow both the parties to lead evidence on the above referred issues and evaluate the same on merit and record the findings on these issues and accordingly submit the same to this Court on or before 31st July 2005. "

12. After the matter was remanded for a limited purpose as above, the appellant led the evidence of the said officers once again viz. S/Shri T.H. Patil, L.R. Deshmukh and D.L. Palnitkar and they were cross-examined by the Advocate for respondent No.1. Respondent No.1 did not step into the witness box this time. Thereafter the learned Judge of the Labour Court was addressed by the Counsel for both the parties. The learned Labour Court Judge framed the issues as directed viz. (i) Whether the misconduct alleged by the Company is proved ? and (ii) Whether during the pendency of the litigation, the workman is gainfully employed ?

13. The learned Judge of the Labour Court gave the findings in the negative on both the issues on

29th July 2005 whereafter the matter has reached before us. The appellant has thereafter sought to amend the Appeal Memo to challenge these findings by adding additional grounds The said amendment was allowed on 14.10.2005. The 1st respondent filed his affidavit-in-reply to deal with these added grounds by his Affidavit affirmed on 18th October 2005 and the Affidavit was taken on record. Counsel for both the parties have advanced their submissions before us.

14. As noted above, as far as the procedural problem with respect to the opportunity to the employer to lead evidence in support of the misconduct is concerned, it no longer survives. That opportunity was afforded in view of the order passed by consent of the parties by the earlier Division Bench on 7th April 2005. The employer has led its evidence, though the workman has chosen not to lead any evidence at this stage. As noted earlier, in view of Clause-3 of the Division Bench order dated 7th April 2005, the findings of the Labour Court rendered earlier as well as that of the learned Single Judge have been set aside by consent. The Division Bench, with a view to avoid further delay, has asked the Labour Court to record the evidence and give its findings while

keeping this Letters Patent Appeal alive. This has been done by consent. If this approach was not to be adopted the LPA could have been disposed of at that stage by passing an order to give opportunity to the employer to lead evidence and asking the Labour Court to decide the matter in the light thereof. It would have meant the Labour Court passing a final order thereafter. It would have led to a Writ Petition before a Single Judge by the aggrieved party and then another LPA. To avoid resultant delay, a consent order was passed by the earlier Division Bench and has sought the evidence and the findings while keeping the LPA alive. Thus, although this LPA is against the order of the learned Single Judge dated 10th/11th January 2002 confirming the earlier order of the Labour Court dated 11th May 1994 the questions with respect to findings rendered by the Labour Court earlier and acceptance of those findings by the learned Single Judge in a way no longer survive. Now, we have the fresh evidence after the opportunity was given to the employer to lead evidence in support of the misconduct and the findings rendered by the Labour Court thereafter on 29th July 2005. The learned Labour Court Judge has held that the misconduct is not established and that the workman was not employed in the

meanwhile.

15. Thus, although we are deciding the LPA, in a way we are exercising a jurisdiction to decide as to whether the findings of the Labour Court on remand are justified or not and in either case what should be the order.

16. Ms.D'Souza appearing for the appellant-Management submitted that since fresh evidence had been permitted to be adduced the validity of the action taken by the Management has to be scrutinised on the basis of this fresh evidence alone. Her submission was that after the order of remand, management had led its evidence, but the workman had not stepped into witness box. Thus the evidence of the management had gone uncontroverted and the learned Judge had erred in ignoring this aspect. In this behalf, she relied upon paragraphs 23 and 26 of the judgment of the Apex Court in **Neeta Kaplish vs. Presiding Officer, Labour Court reported in AIR 1999 S.C. 698**. She also relied upon para-7 of an earlier judgment of a Division Bench of this Court in **Vinayak Bhagwan Shety vs. M/s.Kismet Pvt. Ltd. reported in 1984 I LLJ 203** to the same effect. We have perused these decisions. Both these cases

dealt with a situation wherein the domestic enquiry held by the employer had been found to be defective. It is in this context that the Apex Court has observed in para-26 in Neeta Kaplish's case (supra) that in such a case the record pertaining to domestic enquiry would not constitute "fresh evidence" as those proceedings have already been found by the Labour Court to be defective. Such record would also not constitute "material on record" within the meaning of the phrase "material on record" used in Section 11-A of the Industrial Disputes Act, 1947. In the instant case, the position is quite different. What has happened here is that the domestic enquiry has been held to be fair and proper. The workman has not challenged that finding which was rendered at the end of Part-I of the Award. Obviously the Management will not challenge such a finding and it has not. What it had applied to the trial Court was for an opportunity to lead additional evidence to substantiate its allegations. In the present case, although the Labour Court held the enquiry to be fair and proper at the end of the first stage of the earlier proceedings, in second stage, as has been quoted in para-12 of its Award, the learned Labour Court Judge had held that there was no material in

the enquiry to show that the stolen articles belonged to the Company. Thus, impliedly the Labour Court Judge had held on that basis that the findings were not justified. Therefore, on the footing of a submission on that basis that by a consent order the employer has been permitted to lead additional evidence to prove the misconduct. Certainly the workman could have led additional evidence in defence. However, merely because he has not led any evidence after the remand, it cannot be said that his evidence recorded earlier in the enquiry cannot be looked into. The evidence of both the parties recorded in the domestic enquiry and that after the remand will have to be seen. The workman's refusal to step into the witness box on the second occasion can be pressed into service by the appellant for whatever inference it would like to draw which is another aspect of the matter.

17. Before we proceed to analyse the material on record, it must be noted at the outset that the charge against respondent No.1 was that of theft and subversive of discipline. The charge is established in a departmental enquiry. The standard of proof required in a disciplinary proceedings is that of preponderance of

probability inasmuch as these proceedings are not criminal trials. This has been laid down by the Apex Court in **Union of India vs.Sardar Bahadur reported in 1972 I LLJ 1** where the Apex Court held as follows in paragraph 15:-

> " ..... A disciplinary proceeding is not a criminal trial. The standard of proof required is that of preponderance of probability and not proof beyond reasonable doubt. ..... Where there are some relevant materials which the authorities have accepted and which materials may reasonably support the conclusion that the officer is guilty, it is not the function of the High Court exercising its jurisdiction under Art. 226 to review the materials and to arrive at an independent findings."

18. In this background, when we see the material on record for deciding the allegations of theft we have to decide two elements thereof. Firstly, whether there is material to infer that the drill bits belonged to the Company and whether it could be held that respondent No.1 had removed

them dishonestly and unauthorisedly. The definition of theft in the Penal Code is moving a movable property out of the possession of a person without his consent and with a dishonest intention. Thus, there has to be a dishonest intention. The material has to be moved out of the possession of the lawful owner and it has to be so done without his consent. These are the elements which are necessary for proving theft in a criminal prosecution. As far as the present case is concerned, it is clear from the evidence that nobody has seen respondent No.1 removing the drill bits nor has anybody seen him placing them underneath his scooter mat. The fact, however, remains that these drill bits are found underneath the scooter mat when the 1st respondent was going out of the factory on a scooter and when the scooter mat was checked. It is also clear that there are no marks on the drill bits to indicate that they belong to the appellant-Company. It is in this background that it is to be examined as to what is the probability. Is it probable that the drill bits belong to the appellant-Company and is it probable that the 1st respondent has removed them ? In this connection, we have also to note that as to what is the defence of the 1st respondent. In para-2 of the Statement of Claim,

he has stated as follows:-

> " There were more vested interests working in the company (second party), who did not like the prosperity of the first party so they fabricated a sinister plan to out the first party from the services of the second party. On 26.7.85, on the false (anonymous) complaint, while the second party was leaving the premises of company at 3.35 p.m. after his first shift duty was over, he was obstructed at the gate, by security Supervisor Mr.Deshmukh also alleged to have drill bits from the rubber matting of the scooter No.MTC 9025 which belongs to second party. "

Thus, the 1st respondent has clearly taken a stand in the Statement of Claim that there were certain vested interests who did not like his prosperity and, therefore, they fabricated a sinister plan to throw him out of the service. It is also clear from this Statement of Claim that according to the 1st respondent there was a false anonymous complaint which has led to the checking. The appellant has denied all these averments in its Written Statement. Thus, if the 1st respondent

has made certain specific averments as to why the drill bits were found underneath the scooter mat, it was for him to establish them.

19. It is undoubtedly true that the initial burden of proving the misconduct is on the employer. Thus, it is for the employer to prove that these drill bits belonged to the employer and that the 1st respondent had stolen them. It is clearly not the case of the 1st respondent-workman that those drill bits belonged to him. His only case is that the scooter was parked in an open compound and after he came out of the factory unto the open compound, he started the scooter and went upto the gate where the checking was done. It is his case that it was an open compound and it is possible for anybody to plant or to keep such drill bits at the place where they are found. He has, however, taken a specific plea that they were planted by somebody and that is the stand taken in the Statement of Claim. Illustration (a) of Section 114 of the Evidence Act lays down that Court may presume that a man is in possession of stolen goods soon after the theft is either the thief or has received the goods knowing them to be stolen unless he can account for his possession. In the cross-examination of Shri Patil in the

initial enquiry, it has come on record that the drill bits were new ones, that they are available in the market and they did not bear any mark that they belong to the Company. In para-7 of his examination-in-chief, after remand, he stated that those drill bits were used in the Company for its production and maintenance purpose. They were specialised drill bits made of high-tensile steel and are not intended for domestic or routine purpose. In the cross-examination, he stated that he could not produce any document that the drill bits belonged to the Company. In his cross-examination, he again accepted that there were no special identification marks on the drill bits but denied that they did not belong to the Company. He further stated in the cross-examination that in the written explanation given by the workman before him earlier he had stated that the drill bits did not belong to him. As far as the security Supervisor at the gate is concerned, he certainly could not say anything about the ownership. Thus, as far as the ownership of the drill bits is concerned, it is clear that they are found in the compound of the factory. The Administrative Officer has said that such drill bits are used in the factory. The workman has not disputed it. The only stand taken

by him is that they are otherwise available outside. As far as this aspect is concerned, the security Supervisor has stated that any time any article is brought inside the factory it is to be declared at the gate. Admittedly, the workman had not declared that he had brought any such drill bits. In fact it is his case that he is being framed. On this evidence clearly two views are possible viz. either that the drill bits belong to the Company or they belong to somebody else. The probability of those drill bits belonging to the Company is obvious. If the Enquiring Officer held on this evidence that the drill bits belonged to the Company, it will have to be upheld as a probable view.

20. As far as the second aspect as to whether respondent No.1-workman removed them and kept them underneath the scooter mat is concerned, it is an admitted position that nobody had seen him lifting the drill bits or placing them below the rubber sheet of the scooter. They are however found underneath the scooter mat of his vehicle. In his initial statement at the time of the incident and the second explanation given 48 hours later on, he did not allege that anybody had planted the same. We have noted what he stated in the Statement of

Claim. In the enquiry he mentioned the name of one employee that he must have planted the same. In the Statement of Claim apart from alleging that there are certain vested interests against him he has also alleged that on a false complaint this checking had been done. Thus, the 1st respondent-workman himself is contending that there was a complaint against him and on that basis this checking was done. These are facts which are within his knowledge. Merely by mentioning the name of another employee, it cannot be said that he has discharged the burden which got shifted to him in view of the findings of those articles underneath his scooter mat. He is not in a position to explain as to how those drill bits were found there. Therefore, again the question arises as to whether it is probable for the Inquiring Officer to infer that respondent No.1-workman himself must have removed those drill bits. In our view, it is a probable view.

21. Inasmuch as the articles are found underneath the scooter mat of respondent No.1, the principle of res ipsa loquitur would also apply. It was pressed into service by the Apex Court in **Cholan Roadways Ltd. vs. G. Thirugnanasambandam reported in (2005) 3 S.C.C. 241**. In that matter,

the workman despite noticing another bus coming from the opposite direction did not slow down the vehicle leading to an accident wherein seven persons died. From the speed of the bus itself certain inferences had to be drawn which the Lower Court declined to draw. On the question of standard of proof and the conclusion to be drawn the Apex Court quoted the paragraphs from two judgments which are worth referring :

> "16. In **Maharashtra State Board of Secondary and Higher Secondary Education vs. K.S. Gandhi (1991) 2 SCC 716** it was held : (SCC p.748, para 37)
>
> "37. It is thus well-settled law that strict rules of the Evidence Act and the standard of proof envisaged therein do not apply to departmental proceedings or domestic tribunal. It is open to the authorities to receive and place on record all the necessary, relevant, cogent and acceptable material facts though not proved strictly in conformity with the Evidence Act. The material must be germane and relevant to the facts in issue. In grave cases like forgery, fraud, conspiracy, misappropriation etc.

seldom direct evidence would be available. Only the circumstantial evidence would furnish the proof. In our considered view inference from the evidence and circumstances must be carefully distinguished from conjectures or speculation. The mind is prone to take pleasure to adapt circumstances to one another and even in straining them a little to force them to form parts of one connected whole. There must be evidence direct or circumstantial to deduce necessary inferences in proof of the facts in issue. There can be no inferences unless there are objective facts, direct or circumstantial from which to infer the other fact which it is sought to establish. ... The standard of proof is not proof beyond reasonable doubt, 'but' the preponderance of probabilities tending to draw an inference that the fact must be more probable. Standard of proof cannot be put in a straitjacket formula. No mathematical formula could be laid on degree of proof. The probative value could be gauged from facts and circumstances in a given case. The

standard of proof is the same both in civil cases and domestic enquiries. "

" 18. ..... In Martin Burn case this Court stated : (AIR 1958 S.C. 79 at 85 para 27)

" A prima facie case does not mean a case proved to the hilt but a case which can be said to be established if the evidence which is led in support of the same were believed. While determining whether a prima facie case had been made out the relevant consideration is whether on the evidence led it was possible to arrive at the conclusion in question and not whether that was the only conclusion which could be arrived at on that evidence. It may be that the Tribunal considering this question may itself have arrived at a different conclusion. It has, however, not to substitute its own judgment for the judgment in question. It has only got to consider whether the view taken is a possible view on the evidence on the record. (See Buckingham & Carnatic Co. Ltd. v. Workers of the Company 1952 Lab.

A.C. 490). "

22. If this were a criminal trial, certainly the 1st respondent would be acquitted inasmuch as nobody has seen him lifting the drill bits nor has anybody proved that there were marks on the drill bits to show that they belonged to the Company. However, in a domestic tribunal, the standard to be applied is the standard of probability. If there is some relevant material on record and the domestic authority has accepted it and which material reasonably supports the conclusion that the employee is guilty, then merely because another view is possible, it is not permissible for the High Court to substitute its own view, as held in Union of India vs. Sardar Bahadur (supra). The view taken by the employer, if it is a probable one cannot be termed to be perverse. It can be termed to be perverse only if such a view is just not possible. In the facts of the present case, in our view, such a conclusion cannot be drawn. The findings of the Labour Court, therefore, rendered earlier in para-12 that the employer has not proved that the articles belonged to the Company is unsustainable. Similarly the finding of the Labour Court, on remand, in para-22 of the order to similar effect

is unsustainable. The Labour Court has held on remand that there is no evidence to link the circumstance of possession of drill bits with the dishonest intention of the workman. The Court has acted almost as a Criminal Court and held that there is nothing on record to suggest that he had lifted those drill bits, that they were found less in the department and, therefore, it could not be said that they belonged to the Company. The intention is to be inferred from the conduct and the totality of the circumstances. If on these facts the domestic tribunal comes to the conclusion that respondent No.1-workman has committed theft, in our view, it cannot be termed to be a conclusion without any basis so as to call it perverse. The findings of the Labour Court, therefore, on remand, will have to be interfered, which we hereby do.

23. Ms. Chiparikar appearing for respondent No.1 referred to a judgment of this Court in **Hindustan Petroleum vs. Yeshwat Redkar reported in 2004 II CLR 1057** (to which one of us Gokhale, J. was a member). The allegation against the respondent was for being party to a group of employees who were involved in pilferage of petroleum. The respondent was not the man on the

spot, but a superior officer working on the day and sitting in his cabin far away. He had not examined himself and that was not read against him. In our case, respondent No.1 is the man on the spot. The inference is drawn against him on probabilities and not merely because he did not give evidence on remand.

24. Having held that the domestic tribunal had established the misconduct, then comes the question of appropriate punishment. Now, what is to be noted is that the 1st respondent-workman had joined the factory on 1st September 1983 and in less than two years this incident had occurred. In **Jantha Bazar vs. Secretary Sahakari Noukarara reported in (2000) 7 S.C.C. 517**, the Apex Court has taken a serious view when it comes to incident involving moral turpitude. That was a case of misappropriation and the Apex Court held in para-8 that where there is a case of proved misappropriation there is no question of considering the past record. Earlier in **U.P. State Road Transport Corporation vs. Basudeo Chaudhary reported in (1997) 11 S.C.C. page 370**, a bus conductor had caused a loss of Rs.65/- only to the Corporation. The order of removal was

upheld. In a recent judgment rendered in **Podar Mills vs. Kamalakar Ganpat Sawant reported in 2002 1 CLR 387**, on theft of a brass piece being established, a Division Bench of this Court took the view that the misconduct was in the nature of breach of trust and, therefore, no sympathy could be shown.

25. In the circumstances, as stated above, we cannot but hold that the conduct, as alleged, had been established before the domestic tribunal. This is a case involving theft (although the value of the articles was less than Rs.200/-) and we have to note that the incident had occurred within two years of the employment. That being so, the decision of the employer in discontinuing the services of respondent No.1-workman could be understood. We cannot but set aside the order passed by the Labour Court as well as that of the learned Single Judge earlier and the findings rendered by the Labour Court on remand. On the request of Ms.Chiparikar, we asked Ms.D'Souza as to whether the appellant could take a sympathetic view and re-employ the 1st respondent in another plant. She took instructions and informed that the management was constrained to decline the suggestion since in its view taking back the 1st

respondent will give a wrong signal in a case of dishonesty and will affect discipline.

26. In the circumstances, the Letters Patent Appeal will have to be allowed and also the Writ Petition thereby dismissing the Reference which the 1st respondent-workman had filed in the Labour Court.

27. We are told that the 1st respondent-workman has been paid an amount of Rs.5 Lakhs over the years after the order of the Labour Court. This has been stated by the employer on affidavit. This was on account of the wages that would be payable under Section 17B of the Industrial Disputes Act, 1947. This is because the workman had succeeded in the trial Court and that order came to be stayed by the High Court. Inasmuch as those amounts are held to be sustenance amounts, there is no question of recovering them from the 1st respondent-workman. More than 20 years have gone in the meanwhile. The 1st respondent had succeeded in the Labour Court. He hoped that he will succeed thereafter also and the matter has been pending all these years. He has claimed that he has not been gainfully employed in the meanwhile. This

position has been accepted on remand and we have no reason to take another view. His health has also deteriorated and we are told that now he suffers from malignancy. Considering all these factors, Ms.D'Souza appearing for the appellant-Company has taken instructions from the appellant-employer and has stated to the Court that in the event the 1st respondent-workman accepts this judgment by giving it so in writing, the appellant is ready to pay to the 1st respondent an amount of Rs.6 Lakhs as a gratuitous payment considering his present difficulties. We accept this statement.

28. Appeal is accordingly allowed as above, though without any order as to costs.

(H.L. GOKHALE, J.)

(SMT. R.S.DALVI, J.)